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No. 84187-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KITTITAS COUNTY and CENTRAL WASHINGTON HOME
BUILDERS ASSOCIATION, et al.,

Petitioners,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD, et al.,

Respondents.

RESPONSE TO BRIEF *AMICUS CURIAE*
OF WASHINGTON STATE DEPARTMENT OF ECOLOGY

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. ARGUMENT	1
A. <u>The State has Not Preempted the Field of Groundwater Protection.</u>	1
B. <u>The GMA and RCW 90.44 Create Separate Spheres of Responsibility for Local Government and Ecology to Protect Water Resources.</u>	4
III. CONCLUSION	9

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases</u>	
<i>Dept. of Ecology v. Theodoratus</i> , 135 Wn.2d 582, 957 P.2d 1241 (1998).....	6
<i>State v. Fisher</i> , 132 Wn. App. 26, 130 P.3d 382 (2006).....	2
<i>State v. Kirwin</i> , 165 Wn.2d 818, 203 P.3d 1044 (2009).....	1, 2
<i>Swinomish Indian Tribal Community v. Skagit County</i> , 138 Wn. App. 771, 158 P.3d 1179 (2007).....	5
 <u>Statutes</u>	
Chapter 90.03.....	2, 3
Chapter 90.44 RCW.....	2
RCW 36.70A.020(10).....	4
RCW 36.70A.070(1), (5)(c)(iv).....	4
RCW 69.50.608.....	2
RCW 90.....	3
RCW 90.33.....	1
RCW 90.44.....	4, 5
RCW 90.44.010.....	2

RCW 90.44.050	3, 4, 5
RCW 90.44.105	7

I. INTRODUCTION

The Washington State Department of Ecology has submitted an *Amicus Curiae* brief arguing that Kittitas County has the right and obligation to protect water resources through its development regulations, even though Ecology has the authority to issue water withdrawal permits, and some wells are exempt from Ecology permitting requirements. Ecology has correctly stated the law, and Respondents Kittitas County Conservation, RIDGE, and Futurewise (KCC respondents) submit this brief to augment Ecology's correct argument that the Legislature has not preempted local protection of water resources and to note that the GMA and RCW 90.33 create separate spheres of responsibility to prevent developers from "structuring" applications to avoid Ecology permitting requirements.

II. ARGUMENT

A. The State has Not Preempted the Field of Groundwater Protection.

Ecology correctly notes that the field of water resources protection is not preempted by RCW 90.44. Amicus Brief of Ecology at 12-13. The legislature may preempt a field of regulation from local government when it has indicated its intent to do so. *State v. Kirwin*, 165 Wn.2d 818, 826, 203 P.3d 1044 (2009). For example, the Legislature has pre-empted the

field of setting penalties for controlled substances act violations by stating “[t]he state of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act.” RCW 69.50.608; *State v. Fisher*, 132 Wn. App. 26, 130 P.3d 382 (2006). The Legislature has not preempted the field of groundwater protection in enacting Chapter 90.44 RCW; no section of Title 90 RCW contains express preemption language.

If the legislature is silent on preemption, the court considers “the purposes of the statute and ... the facts and circumstances upon which the statute was intended to operate.” *State v. Kirwin*, 165 Wn.2d at 826. Courts “will not interpret a statute to deprive a municipality of the power to legislate on a particular subject unless that clearly is the legislative intent.” *Id.*

RCW 90.44.010 provides:

This chapter regulating and controlling groundwaters of the state of Washington shall be supplemental to chapter 90.03 RCW, which regulates the surface waters of the state, and is enacted for the purpose of extending the application of such surface water statutes to the appropriation and beneficial use of groundwaters within the state.

Chapter 90.03 establishes Washington’s State water policy:

It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights. Consistent with this policy, the state supports economically feasible and environmentally sound development of physical facilities through the concerted efforts of the state with the United States, public corporations, Indian tribes, or other public or private entities. **Further, based on the tenet of water law which precludes wasteful practices in the exercise of rights to the use of waters, the department of ecology shall reduce these practices to the maximum extent practicable, taking into account sound principles of water management, the benefits and costs of improved water use efficiency, and the most effective use of public and private funds, and, when appropriate, to work to that end in concert with the agencies of the United States and other public and private entities.**

No section of RCW 90 implies that protection of the state's waters has been preempted. Instead, RCW 90.44.050 controls the process for obtaining a withdrawal permit, and exempts some withdrawals from the permitting process. Although the permitting process is regulated by state statute, Ecology must work to reduce waste "in concert with the agencies of the United States and other public and private entities." RCW 90.03.

Local governments are thus required to follow the mandates of the GMA in protecting the waters within their jurisdiction. In this case, Kittitas County was not required by the Growth Board to establish a permit process for water withdrawals in violation of RCW 90.44.050's reservation of the permit issuance process to Ecology. Instead, the Growth Board found the County's failure to regulate land division with water protection in mind to be non-compliant with the GMA. The State has not preempted land division, and Kittitas County thus must follow the GMA's mandates to protect water quality in enacting land division ordinances.

B. The GMA and RCW 90.44 Create Separate Spheres of Responsibility for Local Government and Ecology to Protect Water Resources.

It cannot be controverted that the GMA mandates protection of water resources. As Ecology correctly notes, RCW 36.70A.020(10) makes one of the GMA's goals to "[p]rotect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water." Other sections of the GMA specifically mandate that Kittitas County protect groundwater. RCW 36.70A.070(1), (5)(c)(iv).

The courts have recognized this duty to protect groundwater. In *Swinomish Indian Tribal Community v. Skagit County*, the Court of

Appeal wrote that the “GMA also mandates that local governments adopt comprehensive plans to protect surface water and ground water resources.” [Citing RCW 36.70A.070.] *Swinomish Indian Tribal Community v. Skagit County*, 138 Wn. App. 771, 774, 158 P.3d 1179, 1180 (2007).

The GMA and RCW 90.44 provide different roles for Ecology and local government in ensuring that the State’s groundwaters remain intact for the benefit of all citizens and businesses. Ecology issues permits for some types of water withdrawals; for “single or group domestic uses in an amount not exceeding five thousand gallons a day,” no permit is required. RCW 90.44.050. Under the statutory scheme set forth in RCW 90.44 Ecology thus does not review a property that is a “single or group domestic use” and that draws less than five thousand gallons per day. It is up to local government to regulate when a property is truly a “single or group domestic use” and prevent developers from using the land division process to skirt water regulations.

Kittitas County, for its part, is mandated to protect water quality through its land use planning and development regulations. Only Kittitas County, and not Ecology, can decide what constitutes separate development applications and what constitutes one application improperly

split into multiple proposals. Washington's statutory scheme is thus dependent on teamwork: Kittitas County's attempt to slough all responsibility to Ecology would undermine the State's legislative system for protecting water, and leave a huge loophole in the County's protections for its groundwater.

The cooperative sharing of responsibility between the Growth Management Act and the water codes can also be seen in other areas of the water codes themselves. For example,

RCW 90.03.320 provides that when a permit [for a groundwater withdrawal] is issued, actual construction work on a project for which the permit has been granted shall commence within a reasonable time as prescribed by the Department, be carried out with diligence, and be "completed within the time prescribed by the department." In fixing the time for commencement or completion of the work and the "*application of the water to the beneficial use* prescribed in the permit" the Department is to consider several criteria A 1997 amendment to the statute provides additional criteria if the water is to be applied to beneficial use for municipal water supply purposes, including financing considerations and requirements of the growth management act, RCW 36.70A, and other planning statutes. Laws of 1997, ch. 445, § 3.

Dept. of Ecology v. Theodoratus, 135 Wn.2d 582, 591, 957 P.2d 1241, 1245 (1998). Thus, in other areas of water regulation, like the interface

between land division and well permitting here, the water codes contemplate division of responsibility between Ecology and local government.

The Groundwater Code specifically assigns GMA comprehensive plans the role of helping to identifying whether to reduce “the number of existing and newly developed small groundwater withdrawal wells.” RCW 90.44.105. That section of the Groundwater Code authorizes Ecology to decide applications to consolidate water rights approved through the permitting process and exempt water rights. RCW 90.44.105 directs that Ecology “shall also accord a presumption in favor of approval of such consolidation if the requirements of this subsection are met and the discontinuance of the exempt well is consistent with an adopted coordinated water system plan under chapter 70.116 RCW, an adopted comprehensive land use plan under chapter 36.70A RCW, or other comprehensive watershed management plan applicable to the area containing an objective of decreasing the number of existing and newly developed small groundwater withdrawal wells.” Given the Legislature’s cross-referencing to the Growth Management Act, it is apparent that it intends the GMA and the groundwater codes to work together to cooperatively protect groundwater resources.

III. CONCLUSION

For the reasons discussed herein and in Respondents' opening brief, the Growth Board's Final Decision and Order should be affirmed.

DATED this 5th day of March, 2010.

Respectfully submitted,

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